Supreme Court, U.S.
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No. 05-876

IN THE

Supreme Court of the United States

LAWRENCE SAVOCA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does *Almendarez-Torres v. United States* violate the fundamental imperative of the Sixth Amendment - as edified in *Apprendi* and its progeny - insofar as it allows a judge to raise a defendant's sentence beyond the sentence that could have lawfully been imposed by reference to the facts found by the jury. And therefore, did the procedure applied by the District Court to find that Petition was an "Armed Career Criminal," violate his rights guaranteed by the Fifth and Sixth Amendments.

2. Does the "Commerce Clause" of the Constitution provide federal courts with jurisdiction to prosecute an intrastate attempted robbery of an individual under the Hobbs Act, when the proof showed that even if the robbery had been carried to fruition, the conduct charged would not have materially or substantially effected interstate or foreign commerce.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit, *United States v. Lawrence Savoca*, 05-0967-cr, issued as a "Summary Order" pursuant to Rule 0.23 of the Local Rules of the Second Circuit Court of Appeals, is set out in the Appendix hereto as A-1 through A-6.

JURISDICTION

The judgement of the Court of Appeals for the Second Circuit was entered on October 3, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8 of the United States Constitution, the "Commerce Clause," provides: "The Congress shall have the Power to... regulate Commerce with...and among the several states."

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall be...deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides in relevant part that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed... and to be informed of the nature and cause of the accusation against him..."

The "Hobbs Act," 18 U.S.C. § 1951, states in relevant part

that: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

The "Armed Career Criminal Act"("ACCA"), 18 U.S.C. § 924(e), states in relevant part that: "In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)... the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, that – is burglary..."

New York Penal Law §140.20, Burglary, states in relevant part that: "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." §140.30 provides that: "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a

participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

(d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

Section 140.00(2) of the New York Penal Law provides that: "'Building,' in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer..."

STATEMENT OF THE CASE

Following a trial to a jury in the United States District Court for the Southern District of New York (Robinson, J), Petitioner was found guilty of one Count of conspiracy to violate the Hobbs Act, 18 U.S.C. §1951(a); one count of an attempt to violate the Hobbs Act, 18 U.S.C. §1951(a) & §2; one count of the Use of a Firearm During a Crime of Violence, 18 U.S.C. §924(c)(1)(a)(iii); one count of being Felon in Possession of a Firearm in violation of 18 U.S.C. §922(g)(1).

Subject matter jurisdiction was vested in the District Court pursuant to 18 U.S.C. §3231 and Article III of the United States Constitution. Subject matter jurisdiction was vested in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. §1291 and §1294(1) and 18 U.S.C. §3742(a).

The Trial

The instant prosecution arose out of an attempted robbery which the government alleged was carried out by Petitioner and his brother, Salvatore Savoca. The theory of the government's case was that in the early morning hours of June 21, 2001,

Michael Geary, a man who owned a local tavern known as the "Rhino Grill," got into his car and drove the several miles from where the Rhino Grill was located, to his home in a rural section of Mahopac, New York. (Tr. 77[1])

The evidence showed that as soon as Mr. Geary exited his automobile, an unknown white male - wearing a stocking stretched over his head to disguise his face - came out of the nearby bushes adjoining the driveway and told him to "put up his hands." (Tr. 77; 80; 88) However rather than putting up his hands, Geary lunged at the man. In a panic, his assailant's gun discharged, the bullet hitting Mr. Geary and causing a superficial wound in the front of his thigh. His assailant then fled down the dark driveway. No money or other property was taken from Mr. Geary. Although Geary claimed to have had some of the cash proceeds from his tavern in his pants pocket that evening, no monies or other property were ever offered into evidence at the trial, nor did any police officer or other witness testify to ever having seen or otherwise verify the existence of such proceeds on the night of the attempted robbery. (Tr. 77)

Approximately 15 months after this attempted robbery - in an entirely unrelated incident - police in the Bronx, New York arrested a man by the name of William Lacerenza. A search of Mr. Lacerenza's car revealed a .25 caliber hand gun and an invitation to an engagement party for the Petitioner, Lawrence Savoca. Through subsequent computer analysis, the police were able to match the shell casing recovered from the Geary driveway with the weapon found in Lacerenza's car.

As a result of discovering this hand gun and the invitation, police from the Carmel Police Department ultimately interviewed Nicole Pocchia, the former girlfriend of Petitioner's brother, Salvatore Savoca and also Sandra DeLucca, the ex-

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1. "Tr." is a reference to the trial transcript.

girlfriend of the Petitioner. Each woman gave a statement to the police.

Nicole Pocchia was an admitted drug addict who revealed that beginning at approximately 14 years of age (Tr. 447) she began using a whole range of different illegal drugs. (Tr. 447; 548-549) She admitting using the hallucinogenic drug Ecstasy 30 or 40 times over the course of a year. (Tr. 548-549) She conceded that she had been addicted to cocaine and estimated that she had used cocaine over 300 times. (Tr. 549) She further explained that she took crystal methamphetamine a "few times a week," during the same time period she was addicted to cocaine.(Tr. 550) She admitted taking a drug called Ketamine, also known as "Special K," a form of cat tranquilizer. (Tr. 551) Finally, she testified that from time to time she took hallucinogenic mushrooms. (Tr. 551) While she claimed that at the time of the events in question she had rather abruptly stopped taking drugs, she conceded that she was nonetheless "drinking heavily" during that period. (Tr. 552)

Ms. Poccia told an improbable story, contradicted by much of the empirical proof at the trial. She claimed that on the night of the attempted robbery, rather than being in bed she was waiting in her car at the end of the long driveway that led to the basement apartment that she shared with Petitioner's brother, Salvatore Savoca.

She testified that at 3:20 a.m. in the morning she was awakened by a bat in her bedroom. (Tr. 424-428; 613; 969) She put a blanket over her head, crawled out of the bedroom into living room, picked up the portable phone from the coffee table and then crawled back into the bedroom where the bat was. Once back in the bedroom - and notwithstanding her claim that she was "terrified" by the bat flying around the room - five foot one Nicole Pocchia purportedly climbed up onto a dresser approximately four feet high, and while holding the portable phone in one hand, with the other hand she claimed to have

removed a series of steel pins from the screen covering the window, opened the basement window, and climbed out onto the ground. (Tr. 475; 477-480; 608)

Nicole Pocchia then testified that after waiting in her car for over an hour in the pitch black night, she finally saw a car approaching. Even though she watched the car drive directly towards her for approximately a quarter of a mile, she claimed that somehow its headlights did not effect her night vision. (Tr. 502) When the car finally stopped she saw Salvatore Savoca exit, and for the brief moment that the car door opened and the dome light allegedly came on, she saw Lawrence Savoca in the driver's seat. (Tr. 500-501)

After Sal got out of the car, he allegedly told her; "that he thought he killed somebody." (Tr. 506). Then, according to Ms. Pocchia, Sal went inside. She made no further mention of any bat, he took a shower and they both went off to bed. When asked why she didn't question him further - after he had purportedly told her he thought he had just killed someone - she responded; "Well, if Sal didn't want to talk, I did not talk. (Tr. 507)

However Ms. Poccia went on to claim that over the course of the next few days, several conversations transpired in which Salvatore Savoca implicated his brother has having driven the car on the night he attempted to rob Michael Geary.

Nicole claimed that Sal told her that "Larry had driven to the Geary residence... had let Sal out of the car [and] Larry had driven down the road" to wait for him. (Tr. 436) This account appeared empirically impossible, since it would have meant that Larry had driven to the Geary residence before Geary drove there. The proof however, showed that the road to Geary's house was very long and extremely narrow, and for two cars to pass one another, one would literally have to "pull out of the road bed." If Larry Savoca was indeed waiting "down the road" in his car for Sal, Geary would have had to have passed, and of

course seen the car, since the roads were so narrow. (Tr. 204)

In addition, Nicole claimed that Salvatore Savoca told her that after the attempted robbery: "Sal ran down through the woods. He dropped the gun in the garbage can, and then he went and met Larry up in the car down the road." (Tr. 436) And further that; "they went back and retrieved the gun from the trash." (Tr. 437) Conversely, Geary had testified that after the attempted robbery, his assailant fled down his driveway (not "through the woods"), that he didn't hear any metallic sounds and that he never heard another car, nor saw the headlights of any other car. (Tr. 212-213)

For Nicole Pocchia's story about what Sal purportedly told her to have been true, it meant that after the attempted robbery Salvatore Savoca would had to have; (1) thrown the gun in a trash can, (2) run back to the car in which Larry was purportedly waiting - and which the proof showed would had to have been at least a quarter of a mile away (if not more), (3) that Larry and he would then had to have walked or driven back to the scene, (4) looked for, and successfully found the gun in the right garbage can in the total darkness, and (5) then returned to their car and driven back down the only road in or out of the area.

What made this account ever more incredible, was that the first officer to respond to the scene testified that he arrived at the Geary residence approximately four to five minutes after the event (and explained that the ambulance was already on the scene). He further stated that even though he came up the only road in or out, he saw no one running on any road, that he did not see any cars parked in the roadway nor did he see or pass any cars on the road. (Tr. 244-245; 257-258)

Several months after this incident, Nicole's and Salvatore's stormy relationship ended acrimoniously. On cross examination defense counsel examined her concerning the fact that the first time that she ever told anyone this story, was when the police

came to interview her a year and a half after the alleged incident. She claimed that just prior to telling the police, she had also told her mother, but her mother was never called by the government to corroborate the claim. (Tr. 438)

The other principal witness called by the government was the estranged girlfriend of Lawrence Savoca, a woman by the name of Sandra DeLucca. Although Ms. Delucca and Lawrence Savoca, had lived together for a period, and even had a child during their relationship, by the time that Sandra DeLucca took the witness stand against Lawrence Savoca, her hatred for him was palpable. One witness testified that Ms. DeLucca had told her that; "she will see his ass rot in jail and that she would do anything in her power to make him never see his daughter again." (Tr. 962)

Ms. DeLucca testified that when Larry Savoca moved in with her, he moved some of his clothes and personal effects into a closet in her bedroom. (Tr. 647) Subsequently, in late June of 2001, when Mr. Savoca was not at the apartment, Ms. DeLucca allegedly decided to look through his belongings. (Tr. 647; 652-653) In a shoe box in the closet, Ms. DeLucca claimed she discovered "betting receipts, some cash, a gun, and a clip." (Tr. 653) Although Ms. DeLucca testified that before that time she had never actually "seen a gun in [her] whole life" (Tr. 658), 18 months after this alleged incident took place, she was nonetheless able to positively identify the gun she saw in her closet as the same gun that had been seized at the arrest of William Lazaranza.

Following the government's case, the defense called Salvatore Savoca, who had previously plead guilty to the attempted robbery of Michael Geary. (Tr. 999-1000; 1084)

He testified to his relationship with Nicole Pocchia describing it as "a crazy relationship, very sexual; very, very drug-enhanced... [i]t was a very, very crazy relationship." (Tr. 970) He stated that Nicole had lied when she testified that she

had given up taking drugs, and that at the time of the attempted robbery in June of 2001: "She used cocaine, crystal meth, over-the-counter amphetamines [and] ecstasy." (Tr. 973-974) He also corroborated Nicole's admission that during this period she was drinking heavily. (Tr. 975)

Salvatore Savoca went on to recount the events that led up to the attempted robbery of Michael Geary, as well describing what happened on the night of June 21, 2001.

He explained that he had run up a debt with a bookmaker with whom he gambled. (Tr. 979; 1059) In desperate need of money to settle up his gambling debts, in the first week of June, 2001, Salvatore Savoca approached a runner named Joey, who worked for the bookmaker with whom he gambled. Salvatore convinced Joey to help him rob Michael Geary. (Tr. 1086-1089; 1014-1015) He explained that his original plan was not to use a weapon (Tr. 1096-1097), but that Joey agreed to lend him a gun. (Tr. 1090) Nonetheless, they both agreed that the gun would not be discharged.(Tr. 1090)

Salvatore Savoca related that the reason he wanted to rob Michael Geary on that day was because he knew that Geary usually picked up cocaine from his dealer at his Tavern on Wednesday nights. (i.e. "Usually, the dealer dropped it off for him on Wednesday." Tr. 1072) Salvatore planned to steal the cocaine and sell it to pay off his gambling debts. (Tr. 1015; 1072)

Salvatore Savoca went on to testify that on the evening of June 21, 2001, that he attempted to rob Michael Geary, assisted by Joey. (Tr. 1103-1104). He testified that his brother had nothing to do with the robbery, or its planning, and that he had never told Nicole that he did. He also testified that he had never told Nicole that he had obtained the gun that he had used from his brother Larry. (Tr. 996)

He further explained that although he knew William Lacerenza at the time of the attempted robbery, his brother,

Lawrence Savoca, did not meet him until approximately four months later, in October of 2001. Salvatore had introduced Larry to Lacerenza, because Larry was looking for an apartment and Salvatore Savoca knew that William Lacerenza had an apartment that he was trying to rent. (Tr. 997-998; 1065-1068) He went on to confirm that Lawrence Savoca did in fact rent Mr. Lacerenza's apartment. (Tr. 998)

The testimony that Lawrence Savoca had not met William Lacerenza until four months after the time that the attempted robbery occurred, was corroborated by a government's witness who testified that she had analyzed the phone records of all phones which Lawrence Savoca and/or William Lacerenza had been associated with (Tr. 931), and confirmed that the first time that any of these phone records showed any call(s) between Lawrence Savoca and William Lacerenza, was on October 30, 2001. (Tr. 935-937; also see, government exhibit 22; Tr. 220; 241-243; 860-861)

Finally, the defense called Grace Savoca, the defendant's sister, and his mother Nancy Savoca. Both testified that on the night in question, Lawrence Savoca was with them at his mother's house.

Petitioner's Sentencing

Petitioner was sentenced on February 16, 2005. On Count One, he was sentenced to five years imprisonment. On Count two, to five years imprisonment to run concurrent to the sentence imposed on Count One. On Count Three, a ten year mandatory sentence to run consecutive to the terms imposed on Counts One and Two. On Count Four, to fifteen years imprisonment, concurrent to the terms imposed on Counts One and Two, and consecutive to the term imposed on Count Three. In total, the defendant was sentenced to a period of 30 years incarceration, followed by five years of supervised release.

Although there were no allegations in the Indictment nor findings made by the petit jury with respect to any prior crimes

committed by the Petitioner, at the time of his sentencing, the Trial Court - applying a preponderance of the evidence standard of proof - made the factual finding that the defendant was an Armed Career Criminal within the meaning of 18 U.S.C. § 924(e). In making the required determination that the defendant had been found guilty of committing at least three prior "violent felonies," the Sentencing Court relied exclusively upon "factual summaries" purporting to relate the circumstances underlying the defendant's prior burglary convictions, which the Department of Probation had included in the Pre-Sentencing Report. The Court examined no prior court records, no prior plea agreements, no prior transcripts of plea colloquy, no record of prior findings of fact adopted by the defendant at the time of his plea(s), in short, no prior court documents of any kind. Rather the Court relied exclusively upon these "factual summaries," which appeared to be information independently gathered by the government and provided to the Department of Probation. The source of this information was not disclosed to the Court or to the defense.

Petitioner's Appeal

On appeal to the United States Court of Appeals for the Second Circuit, Petitioner argued, *inter alia*, that the Trial Court's charge to the jury on the jurisdictional prong of the Hobbs Act was inadequate, misleading, and legally erroneous. First, he argued that although the proof had shown that the attempted robbery was for the purpose of stealing cocaine from Michael Geary, individually, the District Court had failed to instruct the jury on the different analysis that applied when a Hobbs Act robbery targeted an individual vis-a-vis an entity engaged in interstate commerce. Second, Petitioner argued that the District Court had misstated the standard that such conduct had to meet in order to satisfy the jurisdictional element of the Hobbs Act. The District Court instructed the jury that the

conduct at issue need not have **"a substantial effect on interstate or foreign commerce... [but that] all that [was] necessary is that the charged conduct affected or potentially affected interstate or foreign commerce in some minimal way**. (Tr. at 651-652, emphasis supplied)

The Court of Appeals found the charge on the interstate commerce element of the Hobbs Act to be legally and factually adequate.(A-4)

Petition also argued that the application of the ACCA by the District Court violated his rights guaranteed by the Fifth and Sixth Amendments to the Constitution.

Because there were no allegations in the Indictment, nor findings made by the petit jury with respect to Petitioner's past convictions, Petitioner argued that under *Jones/Apprendi* and their progeny, it was a violation of his Fifth and Sixth Amendment rights for the Sentencing Court to make the necessary factual findings that the defendant was an Armed Career Criminal within the meaning of 18 U.S.C. § 924(e).

In rejecting Petitioner's argument, the Court of Appeals stated: **"[T]he judge's finding of fact as to prior convictions is explicitly excepted from the rule of *Apprendi*, 530 U.S. at 489-90. Thus, appellant's arguments are without merit."** (A-6, emphasis supplied)

REASONS FOR GRANTING THE PETITION

I. It Is Most Respectfully Asserted That the Time Has Come for this Court to Take the Inevitable "Next Step" in the Evolution of the *Jones/Apprendi* Line, and Set Aside the Holdings in *Taylor, Almendarez-Torres and Shepard.*[2]

With all due respect, the conclusion that the underlying rational of *Taylor, Almendarez-Torres and Shepard* is fundamentally and irreparably flawed, seems inescapable. As Mr. Justice Thomas observed in his concurring opinion in *Shepard*: "*Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." (*Id.* 1264)

If this is so, no amount of "further refinement of *Taylor*"(*Id.* 1264), can cure the problem. Indeed, in a seeming attempt to head off a constitutional confrontation in *Shepard*, this Court restricted judicial fact finding concerning prior convictions under the ACCA to an absolute minimum - least such fact finding trigger a defendant's Sixth Amendment rights to a jury determination. But the decision in *Shepard* is problematic on several levels.

First, it may well be - and certainly Justice Thomas appears to hold the view - that even under the truncated procedures formulated in *Shepard*, the Sixth Amendment may nonetheless

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2. See, *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998); *Taylor v. United States*, 495 U.S. 575, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990); *Shepard v. United States*, ___ U.S. ___, 161 L. Ed. 2d 205, 125 S.Ct. 1254 (2005).

require that such fact finding must be the province of the jury.

Second, one might fairly ask whether the solution crafted in *Shepard* was the best resolution of the competing interests when viewed from the perspective of Due Process, fundamental fairness, the Doctrine of Constitutional Doubt and the Doctrine of Lenity. (see, *Jones v. United States*, "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* 526 U.S. at 857; also; "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." 526 U.S. *Id.* at 858)

In defense of the holding in *Shepard*, Justice Souter wrote of the importance of preserving the symmetry of *stare decisis*. (*Id.* 1261) And while such concerns certainly warrant substantial deference, as Justice Powell observed in his concurring opinion in *Monell v. Department of Social Services*, 436 U.S. 658; 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978): "Stare decisis is usually the wise policy... but this cautionary principle must give way to countervailing considerations in appropriate circumstances." (*Id.* 707)

Under the procedures established in *Shepard*, sentencing courts are now faced with having to decide whether a particular prior felony qualifies for inclusion under the ACCA, by first determining whether the statute under which the defendant was convicted, was a so-called "generic" or a "non-generic" offense. And, while the Court did offer some general guidance in *Taylor* and *Shepard* as to generally what to look for in determining whether a particular burglary statute is generic or otherwise, the task which the District Courts are asked to perform - and perform with a sufficient degree of precision, uniformity and certitude to insure due process and the equal protection of the laws - may simply ask too much.

Secondly, even if the federal judiciary is up to the task, such

an approach, by its very nature, creates a system where there is the substantial - if not predictable - risk, that the results will be to both unjustly punish the genuinely non-violent offender, and concomitantly, to fail to punish others truly deserving of an increased sentence because they are in fact violent recidivists.

This is so, because under the "categorical approach" the sentencing court must put its blinders on. It must ignore the actual underlying circumstances giving rise to the prior conviction and look only to the statutory definitions of the prior offense. If the statute at issue can be read to suggest that it has as an element the use, attempted use, or threatened use of physical force against the person of another, then it must purportedly be counted as a "violent felony," within the meaning of 18 U.S.C. §924(e).

But even here, the decisions of the lower federal courts show wide disparity. Some courts have held that regardless of the actual underlying factual circumstances of the prior crime, a prior conviction qualifies for inclusion under the ACCA if the language of the statute of conviction allows for the conclusion that a violation thereof holds the potential for violence, even though it might in fact be possible to violate the statute without actually committing an act of violence. (see, i.e., *United States v. Begay* and *United States v James, infra*, below). Alternatively, other courts take the contrary approach, and find that if the statute under consideration could, theoretically, be violated by non-violent conduct or by conduct directed at property vis-a-vis another person (and of course, regardless of what actually occurred), then it cannot be counted for purposes of the ACCA (see, i.e., *United States v Bentley* and *United States v Sparks, infra*, below).

This Court in both *Taylor* and *Shepard* explained that this "categorical approach" to the application of the ACCA was necessary because it "responds to the reality of a defendant's prior crimes, rather than the happenstance of how those crimes

'were labeled by state law.'" (*Id.* 589). In support of this position, the Court in *Taylor* cites *United States v. Nardello*, 393 U.S. 286, 21 L. Ed. 2d 487, 89 S. Ct. 534 (1969), stating that in *Nardello*, "this Court held that the Travel Act did not incorporate the common-law definition of 'extortion,' because that definition had been expanded in many States by the time the Act was passed, and because such an interpretation would conflict with the Act's purpose to curb the activities of organized crime. The Court therefore declined the give the term an 'unnaturally narrow reading,' and concluded that the defendants' acts fell within 'the generic term extortion as used in the Travel Act.'" (*Id. 595)*

Most respectfully however, one might make the argument that *Nardello* actually undercuts the reasoning in *Taylor* and *Shepard*. That is to say, the premise of *Nardello* was that labels are unimportant - and given the diversity of 50 state legislatures it is inevitable that many will describe the same "generic" conduct by different titles - nonetheless, it is the conduct that governs, not any particular statutory language. But under the approach mandated by *Taylor* and *Shepard*, it would appear that just the opposite is true. It is not the conduct that counts at all - indeed it must be ignored - it is only what appears in the statutory language of the prior offense that governs. Thus the defendant who has a prior conviction for an crime that could be committed by violence, but in fact committed no violent act of any kind, is nonetheless found to be an Armed Career Criminal. Alternatively, someone who committed a prior crime where actual violence was employed or planned to be employed, may escape the draconian punishment of the ACCA, based solely on the wording of the statute under which he was convicted.

For example, in *United States v Bentley*, 29 F3d 1073 (6th Cir. 1194) a defendant had a prior conviction under Ohio's "Breaking and Entering" statute which provided that: "No person, by force, stealth, or deception, shall trespass in an

unoccupied structure, with purpose to commit therein any theft offense . . . or any felony... No person shall trespass on the land or premises of another, with purpose to commit a felony." (Ohio Rev. Code Ann. § 2911.13) Although the government pointed out that the defendant's indictment expressly charged that he "actually did enter a structure rather than merely trespass[ed] on land," and that it further charged the defendant with specifically "trespass[ing] on the land or premises of WESTERN SIZZLER STEAK HOUSE, with purpose to commit a felony." And further stressed that "the entry of judgment on the guilty plea describ[ed] the crime as breaking and entering"- the Court ruled: "[T]hat one can break and enter in violation of § 2911.13(B) without unlawfully entering or remaining in a building or structure. It follows that violating § 2911.13(B) is not a 'generic burglary' as defined in Taylor... then, we do not inquire into the specific circumstances of the past convictions, but rather we decide the issue based solely upon the statutory definitions of the prior offenses." (*Id.* 1077-1078)

In a similar vein, in *United States v Sparks*, 87 F3d 276 (9th Cir. 1996) the defendant, arrested by the police with a sawed off shotgun, subsequently entered a plea in state court to "attempted home invasion,"in violation of Nev. Rev. Stat. 205.067. That statute which made it a crime for "[a]ny person who, by day or night, forcibly enters an inhabited dwelling without permission of the owner, resident or lawful occupant, whether or not a person is present at the time of the entry, is guilty of invasion of the home."Although the government argued that a "conviction under th[at] statute 'established that the defendant had the specific intent to commit a crime that created a risk of physical injury to another," the Ninth Circuit held that: "The statute itself makes plain that the crime is committed 'whether or not a person is present at the time of the entry.' The crime could perfectly well be committed without

physical injury to a human being."(*Id.* 280)

Conversely, in *United States v. Begay*, 377 F. Supp. 2d 1141 (D. N. M. 2005), a defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g). The government argued that because he had three prior convictions for felony DUI, that he had committed three prior "violent felonies," and that he should be sentenced under the provisions of the ACCA. The District Court agreed. Distinguishing the decision of this Court in *Leocal v. Ashcroft*, 543 U.S. 1, 160 L. Ed. 2d 271, 125 S. Ct. 377 (2004) - on the grounds that "[t]he holding in *Leocal* was based on the specific language of 18 U.S.C. §16" - the District Court held that: "[The defendant is an] an alcoholic... [he] has done little, if anything, to seek help for his alcoholism or to change the behaviors that have lead to the extensive number of arrests for alcohol related offenses including the three felony DUI convictions arising under New Mexico law. Thus, the Court has no difficulty in reaching the conclusion that Defendant's three felony DUI convictions involve conduct that presents a serious potential risk of physical injury to another. Accordingly, Defendant shall be sentenced as an armed career criminal pursuant to 18 U.S.C. § 924(e)." (*Id.* 1145)

A final example of the seemingly manifestly uneven application of the ACCA which can obtain under the "categorical approach," is the decision in *United States v James*, 337 F3d 387 (4th Cir. 2003). In that case a defendant was sentenced as an Armed Career Criminal on the basis of his prior conviction "for failure to stop for a blue light in violation of S.C. Code Ann. § 56-5-70." The Court held that it must apply the "categorical approach, and look only at the fact of conviction and the statutory definition of the offense, and not to the underlying facts of the specific conviction." Holding that the offense qualified as a prior "violent felony" under the ACCA, the Court stated that: "We conclude that the crime of

failure to stop for a blue light constitutes a 'violent felony' for purposes of the armed career criminal enhancement. Applying the categorical approach, we find that failing to stop for a blue light generally proscribes conduct that poses the potential for serious injury to another." (*Id.* 390-391)

As this Court in undoubtedly aware, there is a virtual kaleidoscope of decisions among the Circuit Courts of Appeals as to which statutes are generic or non-generic; which statutes qualify as "violent felonies" and which don't; which statutes are sufficiently "non-generic" to permit some additional "limited inquiry" into the underlying circumstances, and what the nature and scope of such inquiry should be.

The ACCA was intended not only to punish, but to punish severely. Further, it was designed to separate from society those individuals who have demonstrated by their repeated past conduct that they were willing to resort to violence against their fellow man in order to further their own selfish criminal goals. The sanction that results in a finding that a defendant is an Armed Career Criminal is draconian indeed, fifteen years must be added, consecutively, to any other offense of conviction.

Can it be then, that the best way to apply such a statute is to ignore what the defendant's past conduct really entailed. Is it more likely that such a statute will be more fairly and/or more consistently applied, if the underlying conduct is deemed irrelevant.

If the Sixth Amendment requires a jury to make the determination as to whether a past conviction qualifies as a "violent felony" for purposes of the ACCA - which the Court's emerging Sixth Amendment jurisprudence seems to clearly suggest - then most respectfully, it is time to make the necessary changes. The Republic has survived *Booker* (dire predictions to the contrary notwithstanding). It will no doubt survive an opinion by this Court which mandates fact finding by the jury under the ACCA. Not only will such changes accommodate the

constitutional imperative of the Rule of *Apprendi*, but it will insure fair treatment to all.

II. This Court Should Settle The Issue Of The Scope Of Commerce Clause Jurisdiction In Intrastate Hobbs Act Robbery Cases

In *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), the Court identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may "regulate the use of the channels of interstate commerce." Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Third, Congress may "regulate those activities having a substantial relation to interstate commerce.

It is well settled that federal jurisdiction to prosecute an intrastate Hobbs Act robbery, exists - if at all - on the basis of the third prong of Commerce Clause jurisdiction, i.e. that "those activities [] substantially affect interstate commerce. . ."

Following *Lopez*, in *United States v. Morrison*, 529 U.S. 598, 146 L. Ed. 2d 658, 120 S. Ct. 1740 (2000), the Court reiterated that "a fair reading of Lopez shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case," (*Id.* 610) and that *Lopez* had expressly "rejected the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." (*Id.* 617)

Subsequently, in *Jones v. United States*, 529 U.S. 848, 146 L. Ed. 2d 902, 120 S. Ct. 1904 (2000), although less directly on point, the Court again rejected the government's attempt "to render the 'traditionally local criminal conduct... a matter for

federal enforcement.'" (*Id.* 858)

The case at bar epitomizes the prototypical state robbery case. It was a run of the mill, garden variety, state attempted robbery case. In so characterizing the prosecution, counsel does not mean to diminish the seriousness of the conduct, but rather the self-evident lack of any justification for the assertion of federal jurisdiction. As previously noted, the stated intent of the person who actually carried out the attempted robbery - the Petitioner's brother, Salvatore Savoca - was to obtain cocaine that he believed the victim would be in possession of that night. (to wit: "Q. Now, you said you were going to rob Mike Geary on a Wednesday night because you say that's when Mr. Geary bought his cocaine, correct? A. Yes, that is correct. Tr. 1072)

The government however, argued that Mr. Geary would also have been robbed of some of the proceeds of the Tavern that he owned, and that the Tavern was engaged in interstate commerce because it sold liquor from out of state: "José Quervo from Mexico, scotches from Scotland, vodka from France and Sweden,"and because it served customers who may have traveled from other states. (Tr. 141)

Even if this were the case, it is most respectfully asserted that it could never fairly be said that had the robbery been successful, it would have had a "substantial effect upon interstate or foreign commerce."

Federal Commerce Clause jurisdiction was nonetheless sustained in the prosecution below on the basis of "dilution theory," and the "aggregation principal."

As this Court is well aware, notwithstanding the seeming clear parameters that were demarcated in *Lopez* and its progeny, the lower federal courts have uniformly rejected any notion that Commerce Clause jurisdiction in intrastate Hobbs Act robbery cases requires a showing that the robbery had a "substantial effect" upon interstate commerce. Indeed, lower federal court jurisprudence has reached the point where even a "potential,"

"de minimis" effect is sufficient. As the Third Circuit recently held in *United States v. Urban*, 404 F.3d 754 (3rd Cir. 2005): "[W]e have already rejected the argument that Lopez and its progeny require proof of a 'substantial effect' on commerce in an individual case in order to show a Hobbs Act violation ... the de minimis character of individual instances arising under that statute is of no consequence... thus [there] appears to be little doubt that our precedent supports the District Court's use of 'potential' effect and its formulation of the depletion of assets theory in the jury instructions." (*Id.* 766)

Frankly, such reasoning is difficult to square with what appeared to be the unequivocal language of this Court in *Lopez*, that although "admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause... [w]e conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *(Id. 559).*

Equally difficult to square, is the lower federal courts' consistent use of so-called "aggregation theory" to justify Commerce Clause jurisdiction in intrastate Hobbs Act robbery cases, notwithstanding Mr. Justice Thomas' statement in his concurring opinion in *Lopez* that: "Under so-called 'class of activities' statutes, Congress can regulate whole categories of activities that are not themselves either '"interstate' or 'commerce... the aggregation principle is clever, but has no stopping point." (*Id.* 600)

Moreover, although considerations of the constraints imposed by the Doctrine of Federalism played a major role in the Court's decisions in *Lopez* and its progeny - "[t]his case requires us to consider... the significance of federalism in the whole structure of the Constitution (*Lopez*, 514 U.S. at 575) - the Doctrine of Federalism is rarely mentioned in the decisions

of the lower federal courts when considering the scope of Commerce Clause jurisdiction. Yet recent history demonstrates that left unchecked, the proliferation of federal criminal statutes threatens to obliterate (if that has not, in large part, already taken place) what were traditionally regarded as the proper lines of separation between the jurisdiction of the federal government, and of the several states, to prosecute criminal conduct.

In this regard, there can be little doubt but that the effort by the Justice Department to vastly expand federal criminal jurisdiction has proceeded at a juggernaut pace. "A detailed study commissioned by the Federalist Society concluded that there had been a thirty percent increase in federal offenses carrying criminal penalties between 1980 and 2004. Moreover, both the number of federal defendants and the number of federal criminal cases have increased dramatically... [between] 1980 and 2003 the number of cases and defendants in the federal system had more than doubled, with the number of criminal cases increasing 240% and the number of criminal defendants increasing 230%." Sara Sun Beale, The Many Faces of Overcriminalization: Essays: from Morals and Mattress Tags to Overfederalization, 54 Am. U.L. Rev. 747, 753-755 (2005)

The present case is also paradigmatic of the potential for state and federal law enforcement officials to use federal jurisdiction to selectively prosecute and punish those individuals whom they single out for such treatment. Although this case was generated by an investigation conducted by the Carmel Police Department, it was subsequently turned over to the United States Attorney's Office for prosecution. Lawrence Savoca's case was turned over to the "feds,"not because the state prosecutorial authorities (the Westchester County District Attorney's Office), could not have equally well prosecuted the case, not because there was some compelling federal interest in this case (such as preserving the equilibrium of interstate

commerce), but because the penalties were potentially so much greater if a conviction was obtained in federal court.

For the reasons set forth above, it is respectfully asserted that the time has come for this Court to definitively resolve Commerce Clause jurisdiction in Hobbs Act robbery cases.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of October, two thousand and five.

Present: HON. ROGER J. MINER, HON. RICHARD C. WESLEY, Circuit Judges, HON. JED S. RAKOFF, District Judge.[1]

UNITED STATES OF AMERICA,
Appellee,

05-0976-cr

SALVATORE SAVOCA,
Defendant,

LAWRENCE SAVOCA,
Defendant-Appellant.

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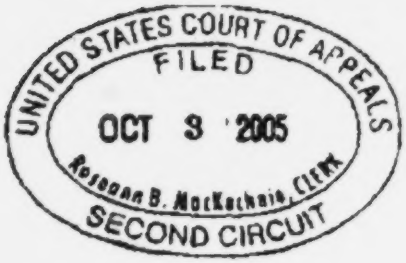
[1] The Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.



Appearing for Defendant-Appellant: JOHN W. MITCHELL, Law Office of John W. Mitchell, New York, New York.

Appearing for Appellee: ELLIOTT B. JACOBSON, Assistant United States Attorney (Michael J. Garcia, United States Attorney for the Southern District of New York, Katherine Polk Failla, Assistant United States Attorney, on the brief) New York, New York.

Appeal from the United States District Court for the Southern District of New York(Robinson, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court be **AFFIRMED**.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. Appellant Lawrence Savoca and his brother, Salvatore Savoca, were indicted on three felony counts stemming from their roles in the robbery and shooting of a Mahopac, New York business owner. The indictment charged: (1) conspiracy to commit robbery, in violation of the Hobbs Act, 18 U.S.C. §§ 1951(a); (2) attempted robbery, also under the Hobbs Act, 18 U.S.C. §§

1951(a) and 2; and (3) using, carrying and discharging a firearm during the commission of a crime of violence, in violation of 18 U.S.0 §§ 924(c)(1)(A)(iii) and 2. In addition, the grand jury indicted only appellant Lawrence Savoca on a charge of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1).

On April 22, 2004, Salvatore Savoca pleaded guilty to the second and third counts and was sentenced to a term of imprisonment of 190 months. Appellant was tried in front of a jury, convicted on all four counts and sentenced to a total term of imprisonment of 360 months. Appellant appeals his judgment of conviction and sentence, asserting: (1) that the district court abused its. discretion in admitting evidence of prior bad acts and convictions; (2) that the district court's jury charge on the interstate commerce element of the robbery counts was erroneous; (3) that the district judge inappropriately removed a juror after the start of trial but before deliberations; and (4) that the district court committed error in augmenting the sentence based on facts not charged in the indictment nor found by the petit jury. We disagree and affirm for the following reasons.

This Circuit has adopted an inclusionary approach to evaluating evidence of other crimes, wrongs or acts. United *States v. Edwards,* 342 F.3d 168, 176 (2d Cir. 2003). In reviewing the district court's decision, "we determine whether: (1) it was offered for a proper purpose; (2) it was relevant to a disputed trial issue; (3) its probative value is substantially outweighed by its possible prejudice; and (4) the trial court administered an appropriate limiting instruction." Id. We review the decisions of the district court on the admissibility of evidence for abuse of discretion. See *Old Chief v. United States,* 519 U.S. 172, 174 n. 1 (1997); *United States v. Schultz,* 333 F.3d 393, 415 (2d Cir. 2003).

The admission of appellant's prior felony convictions and bad acts was the result of his own trial strategy. First, appellant's decision not to bifurcate the felon-in-possession charge was the proximate cause of the Government's introduction of his prior convictions. Secondly, appellant's introduction of character testimony opened the door to the Government's evidence of prior bad acts. Furthermore, appellant concedes that the district judge made a studied and reluctant decision to admit this evidence, and only after extensive consideration and numerous requests from the Government's lawyer. Thus, having reviewed the record thoroughly, we are Convinced that the district court did not abuse its discretion in admitting this testimony

Appellant also challenges the district court's jury instructions with respect to the Hobbs Act charges. Because appellant did not object to the charge at trial, we review the district court's instruction for plain error. See *United States v. Pabon-Cruz*, 391 F.3d 86, 95-96 (2d Cir. 2004). Appellant argues that the district court's instruction failed to properly explain the "diminution of assets" theory necessary to find a violation of the Hobbs Act for attempted robbery. Appellant further contends that the charge regarding the interstate commerce element of the Hobbs Act was manifestly unclear and confusing to the jury. Having reviewed the charge as given to the jury, we disagree and find that appellant falls far shortof showing an error.

Federal Rule of Criminal Procedure 24(c) permits a trial judge to remove a juror for cause prior to deliberations where the juror becomes "unable or disqualified to perform [his] duties." Such a decision is confided to the sound discretion of the trial judge, see *United States v. Gambino*, 951 F2d 498, 502-03 (2d Cir. 1991), and "[a]bsent a clear showing of prejudice, we will not presume it."*United States v. Floyd*, 498

F.2d 982, 990 (2d Cir. 1974).

During trial, one of the jurors - Juror 12 - expressed concern that he had not disclosed his membership in Gamblers Anonymous. The court conducted a voir dire of Juror 12, at which time he indicated that he had disclosed his membership in Gamblers Anonymous to two other jurors. Juror 12 then assured the court that he would perform his duties as a juror, and the district court did not remove him from the panel. The court also interviewed the jurors to whom juror had disclosed his membership in Gamblers Anonymous, both of whom acknowledged the juror's disclosure of his relationship with Gambler's Anonymous. Those jurors also assured the court of their ability to perform their duties as jurors.

Subsequent trial evidence focused heavily on gambling activity. The Government renewed its motion to strike the juror, pressing that the two jurors who were aware of Juror 12's knowledge of gambling might look upon his view of the evidence as that of an expert. The court accepted this concert and removed Juror 12 from the panel. Appellant makes no showing of prejudice, and the decision to remove the juror was made after extensive hearings conducted by the court. Understanding the twists and turns often present in a criminal trial, we find that the district court acted entirely within its discretion in removing Juror 12 from the panel and replacing him with an alternate. Appellant's arguments to the contrary are without merit.

Finally, appellant contends that the district judge's finding, during sentencing, that appellant's prior convictions made him an "Armed Career Criminal" under § 924(e) of the United States Sentencing Guidelines violated appellant's Sixth Amendment rights under the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because he failed to raise these objections below, we review the district court's decision for plain error

only. See Fed. R. Crim. P.52(b); *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

We note first that, in discussing the application of the Sentencing Guidelines, the district court properly stated the rule and application of *United States v. Booker*, 125 S. Ct. 738 (2005), to the facts of this case. Furthermore, the judge's finding of fact as to prior convictions is explicitly excepted from the rule of *Apprendi*, 530 U.S. at 489-90. Thus, appellant's arguments are without merit.

Accordingly, for the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By:

Richard Alcantara

Richard Alcantara, Deputy Clerk